RAMLEE & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Abdul Hamid J.) October 29, 1968]
[Seremban — Criminal Appeal No. 12 of 1968]

Criminal Law and Procedure — Bail bond — Forfeiture of — Bailors ordered to pay by instalments — Criminal Procedure Code (Cap. 6), s. 404(ii).

Once an order of forfeiture of a bond is made and the money is not paid the magistrate has no power to order the payment by instalment.

In this case two bailors appealed against the order of the learned magistrate estreating $1,000 in respect of their bail for $2,000 which they bound themselves to be forfeited in the event of the accused making default in his appearance. The bail bond was signed on August 28, 1967, two days after the accused was first brought to court and thereafter the accused appeared four times in court, in 1967 on October 17 and December 8; in 1968 on March 23 and March 29, but he failed to attend court on January 17, 1968. It appeared that after attending the magistrate's court on two or three occasions the case was fixed for hearing in the sessions court. It was in the sessions court that the accused failed to attend. The first appellant explained that he took steps to ensure that the attendance of the accused on the date or dates on which the accused was required to be present in court including the day on which he was absent.

Held, quashing the order of the magistrate: there was in this case sufficient cause shown against forfeiture, considering the fact that the accused appeared on several occasions in court and that sufficient steps were taken to ensure the accused's attendance.

Procedure laid down in *Khor Ewe Suan & Anor.* v. *Public Prosecutor* (3) applied.

Cases referred to:—

(1) *R.* v. *Chow Fook Loy* [1951] M.L.J. 137.

(2) *Valliamai* v. *Public Prosecutor* [1962] M.L.J. 280.

(3) *Khor Ewe Suan & Anor.* v. *Public Prosecutor* [1964] M.L.J. 220.

MAGISTRATE'S CRIMINAL APPEAL.

S. Kulasegaram for the appellant.

R. Padmanabhan (Deputy Public Prosecutor) for the respondent.

Abdul Hamid J.: This is an appeal by two bailors against the order of the magistrate estreating $1,000 in respect of their bail for $2,000 which they bound themselves to be forfeited in the event of the accused making default in his appearance.

On 17th January, 1968, the accused for whom they stood bail was absent and the learned magistrate issued a notice to show cause to both the appellants why the sum of $2,000 should not be estreated to the Government.

On 5th March, 1968, both bailors showed cause. The magistrate ordered that the sum of $500 be forfeited to the Government against each bailor. Against this order they now appeal. The learned magistrate allowed the bailors to pay in two instalments at $500 per instalment, the first instalment to be paid on 8th March, 1968, and the second on 8th April, 1968.

The learned magistrate in his grounds of judgment stated that he considered the explanation given by both bailors very carefully and came to the conclusion that their explanation was not satisfactory.

The appellants' grounds of appeal among other things allege that —

(i) the learned magistrate failed to direct his mind to the fact that the appellants had no reason to believe that the accused would not be present in court on that day;

(ii) the learned magistrate erred in assuming that the appellants did not take any steps to ensure the attendance of the accused in court on that day;

(iii) the explanation by the appellants is a truthful one and in the event reasonable and satisfactory but the learned magistrate failed to give due regard and consideration to that explanation and in fact assumed an entirely different view of it;

(iv) the procedure adopted by the learned magistrate for estreatment was wrong in law and therefore null and void.

The first three grounds relate to the explanation provided by the appellants and may conveniently be treated as one, and the fourth ground is on a point of procedure.

Here, I observe that the magistrate's order to pay by instalment was wrong. In *Rex* v. *Chow Fook Loy,*(1) it was held that:—

'Once the order of forfeiture of bail bond is made, there is a debt due to the Crown and the magistrate or district judge has no power to order payment by instalments".

The procedure relating to forfeiture of bond is set out under section 404 of the Criminal Procedure Code (Cap. 6) and sub-section (ii) reads:—

"If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of the property belonging to such person".

It seems to me that once an order is made and the money is not paid the learned magistrate has no power to order the payment by instalment.

As regards the explanation by the appellants, it is I think for the learned magistrate to consider whether the appellants have shown sufficient cause why the money should not be paid. I find that the learned magistrate had not properly directed his mind as to the sufficiency of the explanation. In his grounds of judgment the learned magistrate only said this:—

"I have considered the explanation given by both bailors very carefully and I have come to conclusion that their explanation was not satisfactory".

The learned magistrate should have concerned himself whether there was sufficient cause and not whether the explanation was satisfactory or unsatisfactory. He did not go a step further to decide whether in view of the unsatisfactory explanation he considered that appellants had not shown sufficient cause. I cannot assume that this was what the learned magistrate had in mind when he said: "I have considered the explanation given by both bailors very carefully and I have come to conclusion that their explanation was not satisfactory" in the absence of such a finding. In *Valliamai* v. *Public Prosecutor*,[2] the learned judge held that:—

"The relevant provisions relating to forfeiture of a bond are in section 404 of the Criminal Procedure Code (Cap. 6) which provides for 'any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.' This makes it clear that, upon sufficient cause shown, forfeiture may be waived altogether, whilst sub-section (v) further states in specific terms that the court has a discretion to 'remit any portion of the penalty mentioned and enforce payment in part only.' Careful consideration, therefore, ought to be given by magistrates to the question in two stages; first, has sufficient cause been shown against forfeiture; secondly, if not, are the circumstances such that the whole sum of the penalty ought to be enforced."

The bail bond was signed on the 28th day of August, 1967, two days after the accused was first brought to court and thereafter the accused appeared four times in court, that is on 17th October, 1967, 8th December, 1967, 23rd March, 1968 and 29th March, 1968, and he failed to attend court on 17th January, 1968. It also appeared that after attending the magistrate's court on two or three occasions the case was fixed for hearing in the sessions court. It was in this court that the accused failed to attend. The first appellant explained that he took steps to ensure the attendance of the accused on the date or dates on which the accused was required to be present in court, including the day or date on which he was absent. In my view, there was in this case sufficient cause shown against forfeiture, considering the fact that the accused appeared on several occasions in court and that sufficient steps were taken to ensure the accused's attendance.

As regards the procedure I think the case of *Khor Ewe Suan & Anor.* v. *Public Prosecutor*,[3] can be applied here. In that case a statement in *Mallal's* Criminal Procedure, 4th edition, p. 577 was quoted with approval and the learned judge (Hepworth J.) held that:—

"In this case the court had not drawn up proceedings against the principal and the sureties under the section. It seems to me that evidence should have been led producing the actual bail bond and stating that the bailors were the persons who had entered into the bond. They should then have been given an opportunity to cross-examine the witness who produced the bail bond and to show cause why their recognizance should not be forfeited. They should have been invited to go into the witness box and state their case, if they so wished, calling any further evidence which they required. This had not been done."

Although in this case the appellants did go into the witness box and show cause on oath no evidence on oath was taken by the magistrate as to the forfeiture of the bond and no evidence was led to produce the actual bail bond and to state that the bailors were the persons who had entered into the bond.

In that case the learned judge quashed the order of the magistrate and remitted it to the magistrate for taking further evidence. In this particular case, however, since I am of the opinion that sufficient cause had been shown I do not propose to do that. Accordingly I quash the order of the magistrate forfeiting the bond and order that the sum as stated be refunded.

Order accordingly.

Solicitors: *Ranjit, Thomas & Kula.*

KRISHNAN v. ABDUL RAZAK & ANOR.

[O.C.J. (Winslow J.) October 30, 1968]
[Singapore — Motion in Suit No. 343 of 1967]

Practice and Procedure — Partners — Action against partner individually — Failure to file his defence — Final judgment against him — R.S.C., 1934, O. XVI r. 4.

Where an action is brought against partners individually and not in the name of the firm, the failure of any partner to file a defence entitles the plaintiff to sign final judgment against him.

Case referred to:—

(1) *Jackson* v. *Litchfield & Sons* (1882), 8 Q.B.D. 474.

MOTION.

N. C. Goho for the applicant/1st defendant.

L. A. J. Smith (*V. K. S. Narayanan* with him) for the respondent/plaintiff.

Winslow J.: The main question for determination on this motion by the first defendant to set aside the judgment entered against him in this action on 31st May, 1968 for failing to file his defence to the writ of summons herein is whether he and Mohamed Hidayathullah were being sued as partners individually, though trading as M.M.H. Sahib, or whether they were being sued in the firm name.

The writ of summons herein describes the defendants as "M.S. Abdul Razak and Mohamed Hidayathullah (trading as M.M.H. Sahib)".

Had the plaintiff sued them in the name of the firm under O. XLVI r. 1, any judgment obtainable by him could only have been a judgment against the firm by its firm name and the present applicant's motion would have been unanswerable on the authority of *Jackson* v. *John Litchfield & Sons* [1] That, however, is not the